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4.2.4 Tipping the Scale in Favor of the Right Holders: The European Anti-Circumvention Provisions

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Abstract: The European directive on the copyright in the information society provides for some provisions against circumvention of Digital Rights Management technologies. Circumventing a technological measure or making and trafficking in circumvention tools are now prohibited activities in the European Union. Despite the expressed intention of the European lawmaker to safeguard a balance between the rights of the copyright holders and the interests of the users and society at large, the anti-circumvention provisions give the rights owners preference: the protection is broad and surely extends beyond the boundaries of copyright; the exceptions are overridden, albeit the empty promise of the article 6(4). The scale has been here mostly tipped in favor of the economic interests of the authors. This paper describes the anti-circumvention provisions of the directive and the new (im)balance they put in place.

I Introduction

On the 22 May 2001, the European Council has finally adopted the directive on the harmonisation of certain aspects of copyright and related rights in the information society¹¹⁶¹. This directive completes a process of harmonization of copyright and related rights amongst the Member States and of adaptation of copyright to the information society, that has been engaged in as early as 1995 with the Green Paper of the European Commission on copyright in the information society¹¹⁶². The directive also implements the WIPO treaties of 1996, as the United States have done in 1998 with the Digital Millennium Copyright Act. Six topics have been considered as requiring a Community intervention for harmonization: the right of reproduction, the right of communication to the public, the right of distribution and the extent of its exhaustion, the exceptions to copyright and related rights, the technological measures of protection and the rights management information.

This article will consider only one of those topics, that of the legal protection of technological measures, otherwise called the anti-circumvention provisions. It was certainly one of the key issues in the negotiations that have led to the adoption of the directive. The controversy surrounding such protection, and notably the relationship between technical lock-ups and limitations to copyright, was so intense it was nearly the breaking point of the whole directive. It kept being a contentious issue until the end when the Commission finally brought a proposition for a solution concerning the preservation of the exceptions.

The solution, as enacted in article 6 paragraph 4 of the directive, is but a delicate compromise between the friends and the foes of an absolute legal protection. As

any compromise, it is built on intricate and cryptic provisions. Legal scholars, let alone students, will likely have a hard time understanding their meaning. The compromise is also a delegation to Member States since the ultimate outcome of the article 6 will be that the national lawmakers will have to find the panacea to the conflict between technological measures and copyright limitations.

The anti-circumvention provisions are laid down in the article 6 of the directive that states:

1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.
2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:
 - a) are promoted, advertised or marketed for the purpose of circumvention of, or
 - b) have only a limited commercially significant purpose or use other than to circumvent, or
 - c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.
3. For the purposes of this Directive, the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.
4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned. A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by righthold-

¹¹⁶⁰ University of Namur (Belgium).

¹¹⁶¹ See: Directive 2001/29/EC.

¹¹⁶² See: Green Paper (1995).

ers to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply *mutatis mutandis*.

The first two paragraphs deal with the activities to be prohibited by the Member States: the circumvention of a technological measure on the one hand, the trafficking of devices enabling such a circumvention on the other hand. A next Section of this article will consider this twofold prohibition. Beforehand, the first section will turn to the definition of the technological measures to be protected by the article 6 of the Directive, as described in its paragraph 3.

The paper will then give an overview of the most intricate provision of the directive, which deals with the exceptions facing the technological measures. Laying down some rules to safeguard exceptions in a technologically protected copyright world, article 6(4) doubtless is the most important and perhaps revolutionary part of the directive. A great part of this article will be devoted thereto and analyze thoroughly the intents and results of this desire towards a balance.

ak finally, the directive also comprises several other provisions regarding the technological measures. Some are hidden in the recitals of the directive¹¹⁶³, some in other articles than article 6. They might in some cases establish key or odd principles in that field. The last Section will examine these diverse provisions.

It is worthwhile to note — and it could be of some interest to persons who are not accustomed to the European legislative process — that an European directive is not in force by itself. It constitutes only some basic provisions that the Member States are obliged to transpose in their laws. Therefore, the provisions

¹¹⁶³ Recitals of European directives have no mandatory nature by themselves. They normally serve as helping the interpretation of the provisions of the directive. They should not be transposed as such by the Member States when implementing the directive. Nevertheless, they are increasingly used as a vehicle for additional or accessory rules. The directive on the copyright in the information society includes some key provisions in its recitals. It is unclear whether the Member States have to take them into account. Since they have to implement an appropriate protection of technological measures, some rules of the recitals could play a role in considering the appropriateness of the protection. For instance, as far as limitations to copyright are concerned, "appropriate" should mean a balanced protection. Therefore the limitations laid down in the recitals should be considered by the national legislators.

as appearing in the directive of 2001 and as explained below, will not be of direct application in the Member States. The latter are only obliged to transpose in their regulatory framework the principles of the directive, when needed. They are free to do so in any way that is not incompatible with the objectives and principles of the adopted directive. As a consequence, the national regulatory frameworks that will emerge from the transposition process might be slightly different than the provisions of the article 6¹¹⁶⁴. Besides, only the fields where a need for harmonization is needed so as to ensure a smooth functioning of the internal market are open for directives at the European level. That explains that the anti-circumvention provisions laid down in the directive do not comprise any remedies, which are traditionally considered as a matter for Member States' authority.

II Object of the Protection

Technological measures to be protected against both circumvention and trafficking of circumventing devices are defined in article 6(3) as: "*any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC*".

Such a definition is very broad. It covers any technical tool used by a copyright owner to protect her work and the distribution thereof. The key element here is the restriction of acts which are not authorized by the rightholder. The anti-circumvention provisions laid down in the directive vest any device that conveys in the practice — in the machine — a lack of authorization of the author. This makes the protection of article 6 larger than that in the prior versions of the European text. The draft proposal of 1997 only dealt with technological measures designed to prevent or inhibit the infringement of any copyright or any rights related thereto. At first sight, that meant that only the devices aiming at following the contours of the exclusive rights of the author or holder of a neighboring right were concerned¹¹⁶⁵. The technically granted monopoly had to be rather similar to the legally granted one. One straight example is the anti-copy

¹¹⁶⁴ One good example of the somewhat diverse transpositions is the implementation of the 1991 software directive and of its provisions on technological measures. The picture of the Member States was fairly rainbowed, from countries that transposed the very wording of the prohibition of circumvention devices in the field of computer programs, to countries where the existing regulatory framework has been considered as offering an adequate protection. France has done so and justified the lack of a specific provision related to anti-circumvention devices, save for a peculiar publicity obligation, by asserting that the general regime and case law governing aiding and abetting copyright infringement could sufficiently cover the prohibition of circumventing devices.

¹¹⁶⁵ Nevertheless, other types of measures could have been covered given the definition of the effectiveness of such measures. See *infra*.

device whose primary function is to apply the exclusive right of reproduction. The adopted version of the directive goes largely further. Technological measures restricting any activities included in the legal ambit of the copyright are protected, as well as any mechanism inhibiting uses not accepted by the copyright owner, even though such uses are not per se restricted by the legal monopoly. It suffices that the copyright owner forbids by contract one use or another so that the technological measure that applies her will, is protected by article 6.

Even the Digital Millennium Copyright Act does not go so far. Apart from technological measures that protect a right legally granted by the Copyright Act, the protection extends to measures that grant access to works, such measures being clearly circumscribed.

In the European directive, the technological measures shall only be deemed effective — and as a consequence covered by the protection — *“where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective”*.

A first comment here is that such a formulation might appear rather circular. The technical protection will be considered as effective only when its process “achieves the protection objective”. According to Pierre Sirinelli, this construction would destroy the whole system¹¹⁶⁶. As Sirinelli, I don’t think this provision should be read as requiring an infallible lock-up. Anyway, such wording remains very ambiguous. Rather than giving sense to the effectiveness criterion first laid down by the WIPO Treaties, the European lawmaker, as the DMCA drafters for that matter, has only used that element as a precision of the definition of the technological measures to be protected.

Effectiveness will be namely met when an access control is applied. A lot has been said about this surprising consequence of the protection of technical measures controlling access to works being that such protection might lead to grant a new right to copyright holders, i.e. the right to control access to works¹¹⁶⁷. This new ‘de facto’ right goes beyond the criteria of exercise of their rights which justified the protection of technological measures enacted by the WIPO Treaties. In our opinion, granting access to her works is not — and should not be — as such an exclusive right granted to the author by copyright law. Anti-circumvention provisions that include such a technical feature in the copyright regime dramatically shift the underlying paradigm of the protection of literary and artistic works. For sure, it might be the end of the copyright world as we know it.

The 1997 proposal for the information society directive only referred to the control of access to works as far as effectiveness was concerned¹¹⁶⁸. Were this first

¹¹⁶⁶ See: Sirinelli (2001).

¹¹⁶⁷ Controlling access to works being included in the copyright ambit is still fiercely discussed. See: Ginsburg (2000); Hansen (2000); Heide (2000): 993–1048; Koelman, Helberger (2000): 174; Dusollier (2000): 25–52.

¹¹⁶⁸ See: Dusollier (1999): 285–297.

version be adopted, some technical measures would have been left out of the Directive. For instance the Serial Copy Management Systems, or the mere anti-copy devices, or even some digital right management systems which would be designed or programmed only for usage-tracking purposes. In such cases where the access is not the main objective of the technological measure, it could have been feared that the device would not be entitled to benefit from the protection¹¹⁶⁹. In the legislative process, the European Parliament has put the control of the use of the copyrighted work aside the ‘access’ element. That covered more largely any type of technological measures, whatever they controlled access to, copy or any other use of the work. In the finally adopted directive, only the ‘use’ element remains. This clearly covers a whole range of electronic protection tools. Though, the scope of the protection granted by such a wording (‘use’) is fairly extensive, along with what the first alinea of this paragraph has showed. Any device that restricts any use of the work, from the access thereto to any eventual enjoyment of the work, is deemed as effective, hence entitled to the ban on circumvention activities.

As I have seen earlier, since the definition of technological measures does not strictly relate to copyright infringement but also to any use against the private will of the copyright holder, it confirms that as soon as the access to the work is restricted by the author, the technical lock-up conveying this will is protected by the anti-circumvention provisions.

Finally, the definition precise that effective protection processes encompass encryption, scrambling¹¹⁷⁰ or other transformation of the work or other subject-matter or a copy control mechanism. One major mistake has thus been corrected. Earlier versions of the directive said that the technological measures to be protected were effective processes including decryption or descrambling, which were precisely the activities against which the protection was directed. The adopted text is now more adequate by providing that encryption and scrambling are amongst the protected technologies. This highlights once again that access controls are clearly belonging to the protection scope.

III The Scope of the Prohibition

III.1 Circumvention Act v. Circumvention Devices

The 1997 proposed directive prohibited any “activities” of circumvention, some of them, e.g. the sale or rental of circumvention devices, being unexhaustively listed. The very act of circumventing a protection mechanism was not clearly outlawed. Since 1999, successive versions of the directive, have stressed a plain distinction between the circumvention and the trafficking of circumventing devices, both being prohibited. Now the first paragraph of article 6 prohibits the

¹¹⁶⁹ See: *ibidem*.

¹¹⁷⁰ This sufficiently demonstrates that the directive is primarily concerned with encryption and other access controls.

circumvention of technological measures while the second one deals with the trafficking of any devices enabling or facilitating the circumvention.

Let's start with the circumvention. A former version of the directive provided that the circumvention had to be unauthorized by the rightholders. This condition has faded away albeit the lobbying of some rightholders in favor of this non-authorization requirement. As a matter of fact, one can wonder to what extent this precision could have better served the interests of the copyright holders. It seems rather logical that the prohibition applies only where the circumvention is not duly authorized by the authors.

The provision does not repeat anymore that the technological measure whose circumvention is prohibited, aims at protecting the copyright, related rights or the sui generis rights applied to databases. Since the object of the protection is fully defined in the paragraph 3, the clearing up of the text makes it less intricate.

As far as circumvention is concerned, an intent requirement has nevertheless been added. Only the person carrying out in the knowledge, or with reasonable grounds to know, that he or she is pursuing the objective of circumventing a technological measure could be held liable under article 61 of the directive. Such a knowledge is not required in the anti-trafficking provision.

The prohibition of activities related to circumventing devices is very broad. Should be prohibited or regulated by the Members States when implementing the directive the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of unlawful devices¹¹⁷¹. The provision of services of circumvention is mentioned as well. As a consequence, most trafficking in activities should be covered. Nevertheless, the directive does not add a safeguard clause of the type of the section 1201(a)(2) of the DMCA that further prohibits the "otherwise trafficking in". The list of activities in article 6 is thus closed. However, one recital¹¹⁷² provides that legal protection of technological measures is without prejudice to the application of any national provisions which may prohibit the private possession of devices, products or components for the circumvention of technological measures. The scope of the prohibited activities related to circumvention devices could thus be broader in some countries so as to include the private possession of such devices.

The activities to be prohibited are the same than those prohibited by another key directive in the field of anti-circumvention: the directive on the legal protection of services based on, or consisting of, conditional access¹¹⁷³. The conditional access directive¹¹⁷⁴ covers radio or television broadcasting services and information society services, normally defined in European Union legislation as "any service normally provided for remuneration, at a distance, by electronic means

and at the individual request of a recipient of services"¹¹⁷⁵. The main purpose of this directive is to prohibit trafficking in devices that could circumvent a conditional access service¹¹⁷⁶. Therefore, it presents a close relationship with copyright-related anti-circumvention provisions. The implications of this link between both fields, though largely overlooked in the early days, are now regularly addressed by legal scholars¹¹⁷⁷. The similarity of activities to be prohibited in both directives proves that the European lawmaker has clearly seen the likely relationship between both texts.

III.2 Unlawful Devices

The illegitimacy of the devices, products or components as related to their potential use as a circumvention tool is determined by three alternative criteria. Either the device is promoted, advertised or marketed for the purpose of circumvention, or has only a limited commercially significant purpose or use other than to circumvent, or is primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures. Criteria to be met here are pretty similar to those of the DMCA.

As a practical matter, the provision covers devices that are clearly intended to serve as a circumvention tool. The commercial asset of such devices should reside in this probable use. Therefore, the design or the marketing of the product primarily stress this circumvention function.

This does not mean that considering the unlawfulness of some multipurpose devices will be an easy task. At the end of the day, only the courts will decide whether one particular device is legitimate or not. The "primary purpose" criteria, if it seems more balanced than the "sole intended purpose" that has been sometimes put forward¹¹⁷⁸, does not settle the matter in a definitive way. The determination of the threshold of a primary purpose, between infringing and not-infringing uses that multi-purposes devices could enable, is still to be made.

¹¹⁷⁵ See the Article 1(2) of Directive 1998/34/EC: p. 23.

¹¹⁷⁶ Protection applies to services on two conditions. The first one is that the service is based on a conditional access, which is defined as "any technical measure and/or arrangement whereby access to the protected service in an intelligible form is made conditional upon prior individual authorisation". The directive also covers the provision of conditional access to the above services, considered as a service in its own right. Thus both the service provided upon conditional access and the technique or the service granting such access are concerned. The second condition is that the purpose of conditional access is to ensure the remuneration of the service.

¹¹⁷⁷ See: Heide (2000): 993-1048; Koelman, Helberger (2000): 174.

¹¹⁷⁸ See the Software directive. Thomas Vinje was a strong proponent of the sole intended purpose criteria, see: Vinje (1996): 431-440.

¹¹⁷¹ The unlawfulness of the devices will be considered below.

¹¹⁷² See: Recital 49 of the Directive.

¹¹⁷³ See: European Parliament and Council Directive 98/84/CE.

¹¹⁷⁴ For a complete overview of the directive, see: Helberger (1999): 88.

III.3 The Prohibition within or outside of Copyright Regime

According to the subsidiarity principle, the Member States should be free in the manner to implement the anti-circumvention provisions of the directive in their own regulatory framework, as long as the objective of the directive is met and the competition in the internal market is not distorted. In our view, nothing prevents Member States from enacting the anti-circumvention regime out of copyright, for instance in a separate piece of legislation.

Countries could indeed decide to implement the WIPO Treaties obligations on technological measures in fields of law other than in copyright,¹¹⁷⁹ e.g., in conditional access regimes, unfair competition laws or computer crime regulatory framework. The 1996 Treaties do not forbid it¹¹⁸⁰. What WIPO, and the European directive, only require is that the protection be adequate.

However, the easily-overlooked article 8 of the directive limits this freedom of manoeuvre. It states that each Member State shall take the measures necessary to ensure that rightholders can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of circumventing devices. The legal field in which the anti-circumvention provisions will be placed should therefore include such remedies and sanctions. For example, this will not be the case for computer crime legislation.

IV Boundaries of Copyright

Technical locks can jeopardize the legitimate exercise of exceptions to copyright and the whole balance of the copyright regime. That song has been largely heard. It was a key issue to be solved by the European law-maker that has finally stated its solution in the fourth paragraph of the article 6 of the directive.

Compared to other anti-circumvention provisions around the world, the European ones distinguish themselves in the manner they face the issue. Indeed, while the United States or Australia have only considered the solution to that 'fair use' issue at the level of the sanction for circumvention, the European Union has chosen to rule the matter even before the enforcement stage. The former countries have enacted different safeguard mechanisms but both exempt the user when the circumvention she carried out was in the framework of the legitimate exercise of

some exceptions¹¹⁸¹. In such a case, the legitimate use being technically locked-up, the user has no choice but to circumvent the digital protection. The US law does not give her the tools to do so but will not hold her liable in some, albeit strict, conditions. The Australian law also grants a non liability in that case to providers of the circumvention means. The message here is thus: "circumvent—we-do-not-sue". It does not actually solve the issue of the digital lock-up. While in the analogue environment the copyright exemption was primarily used as a defense in litigation for copyright infringement whatever its success might be, in a digital world wrapped by technological devices, the function of exemptions system will be completely different. If any act of reproduction or communication of a copyrighted work is inhibited by a technological protection, the user will have either to sue the rightholder for enabling her to exercise her exemption (for instance for research, education, criticism purpose); either to deploy some skill for circumventing the technical measure. In both cases, the burden imposed on the user is rather heavy. The solution put forward by the DMCA and the Australian Copyright Act resumes the function of the exception as a defense only in the case of an action brought against the user for having circumvented the system. (or against the provider of a device in the Australian case for having distributed the device). Both solutions do not seek to reduce the technological restraint on the legitimate exceptions. This is what the directive tries to achieve.

Indeed, the European directive seeks to put the balance in favor of the user not at the stage of the sanctions for circumvention, but at the earlier stage of the very exercise of the exception constrained by a technical measure. To this end, the directive puts forward an intricate provision, the article 6(4).

The first principle laid down in this article is to entrust the rightholders with the task of reconciling the technological measures with the safeguarding of the exceptions. The first indent of 6(4) states: "*in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation, the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned*". The intervention of the lawmaker is therefore subsidiary to that of the authors and other rights owners.

¹¹⁷⁹ Opponents to the anti-circumvention provisions in copyright have sometimes argued that new protection was useless since other existing regimes could offer sufficient protection and meet the concern of right holders. According to scholars, the adequate protection was to be found in computer crime, unfair competition law or European conditional access protection. See: Koelman, Helberger (2000): 222. Japan, for instance, separates anti-circumvention of technical measures protecting rights of the authors, laid down in the copyright act, from anti-circumvention of access controls that it regulates under unfair competition law. Different legal techniques respond to two different protection features.

¹¹⁸⁰ Intervention of Kurt Kemper, Workshop on the WIPO Treaties, 6-7 December 1999, Geneva.

¹¹⁸¹ Yet, both systems are largely different. The US DMCA does not held liable the circumventer in very limited cases (such as reverse engineering, security testing, etc.) that do not run parallel to the copyright fair use and when the technological measures protects an exclusive right. Furthermore, generally the exceptions to anti-circumvention provisions — or the 'fair hacking' rights, as Jane Ginsburg has qualified them — only applies to the circumvention itself and not the trafficking in circumvention devices. Conversely, the Australia does not prohibit the circumvention itself but the trafficking in the circumvention devices. The fair use concern is thus limited. Anyway, the Australian regime enables the trafficking in circumvention devices where the user who will use the device, signs a declaration that the device will be only used for an identified permitted purpose. On the Australian provisions, see: de Werra (2001); Fitzpatrick (2000): 214-228.

Preference is given to any voluntary measures taken by rightholders. The State should intervene only in default of such measures. The directive does not define the 'voluntary measures', save for mentioning agreements between rightholders and other parties concerned. As examples, the rightholders could devise or revise the technological measures so as to accommodate some exceptions or put in a place some breathing space in favor of the user; provide some 'big' users with unlocked copy of the works or apply alternative pricing policy¹¹⁸². Rather than the safeguarding of the exceptions and limitations of copyright, the freedom to contract of the authors is here privileged. The exception is clearly to be contracted¹¹⁸³. Such a principle stands along the solution advocated by Tom Bell who considered the "fair use" to become "fared use"¹¹⁸⁴ so as any exception could be licensed and paid for. What remains of the exception, whose key principle is to skip the need for an authorization of the rightholder, in such a bargaining?

In default of such measures form rightholders, the Member States are obliged to take "*appropriate measures to ensure that rightholders make available the means of benefiting from [some] exception[s]*". But nothing indicates when the default from the side of the rightholders will be sufficiently patent as to necessitate that the State takes the stage. It should be stated in the national implementation of the directive, the period of time at the expiration of which, if no measures have been taken by rightholders, the State must intervene, and the criteria for considering the appropriateness of the measures taken by the authors. On the latter, the directive prescribes nothing. Yet, the State should be allowed to address the merits of the measures taken by the rightholders before considering its intervention. Would any measure, even minimal, free the State from its legislative duty to safeguard the public interest, it would give too much of a unrestrained power to the authors.

The purpose of the appropriate measures to be taken by the States is to make available to the users the means of benefiting from exceptions. Such means should be made available only to beneficiaries of exceptions who have legal access to the protected work. This does not mean that the access to works should be granted to such users. Only the persons who have already access to works should be empowered to exercise legitimate exceptions. The case referred to here is when a work that has been legitimately purchased (or when the access thereto has been legitimately gained in whatever manner) is technically protected to the extent that some legitimate uses cannot be accomplished. For instance, a technical lock-up over a CD ROM on the history of the United States, rightfully purchased by a teacher, could prevent her from any copy for use in the classroom. Or a library would be restrained to make an archival copy of a database it has paid for. Article 6(4) is not about granting a free access to users.

¹¹⁸² Those are some measures mentioned by The International Federation of Phonograms Industry (IFPI).

¹¹⁸³ That is reinforced by the reference to 'agreements'.

¹¹⁸⁴ See: Bell (1998): 558-618.

The directive does not give any indication about the type of appropriate measures the Member States could take, nor how the Commission will consider the appropriateness of the taken measures, hence the proper implementation of the directive. Leaving the freedom to States to decide which measures could be appropriate to safeguard the exceptions was likely a way to get rid of this tricky issue; it will also be a likely failure of the objective for harmonization amongst Member States. Should rightholders make their technically protected works and products compliant with different measures from one country to another, it would certainly not help a smooth functioning of the Internal Market.

This favor to users is only granted to some limited exceptions¹¹⁸⁵. These are the exceptions in respect of reproductions on paper or any similar medium or reprography (article 5 (2) a), in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives (article 5 (2) c), in respect of ephemeral recordings of works made by broadcasting organizations (article 5 (2) d), in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes (article 5 (2) e), the use for the sole purpose of illustration for teaching or scientific research (article 5 (3) a), uses for the benefit of people with a disability (article 5 (3) b) and the use for the purposes of public security (article 5 (3) e). The private copy exception enjoys a specific regime I will consider later on.

Neither the directive, nor the legislative history explain why some exceptions have been elected to this favoring regime while others have not. It has been said that these were exceptions that conveyed strong public interests, such as fundamental freedoms. Yet, neither the exception of parody, which is a persuasive illustration of the freedom of expression concern, nor the exception for news reporting, which translates the concern of the freedoms of information and of the press, are included in the restricted list of article 6(4). One could also explain the criteria having lead to the choice of some exceptions by the fact that the user of each exception is easily identifiable, which could make it easier to establish a contractual relationship between the user and the rightholder. Some exceptions of the list indeed relate to identified user such as the libraries and archives, the broadcasting organizations, the educational establishments, some social institutions, or administrative offices. But the argument is not convincing altogether. What about the reprography exception whose users are potentially any member of the public? Why is the news reporting exception, whose beneficiaries, i.e. the press and reporters, could be easily identified, not included in the list then?

Member States should take appropriate measures only for exceptions listed in article 6(4) to the extent such exceptions exist in their regulatory framework. We have seen that the list of exceptions allowed in the article 5 of the directive

¹¹⁸⁵ It should be reminded that the directive states a long list of 23 exceptions whose only one (i.e. the exception for temporary acts of reproduction) is to be mandatorily implemented in the regulatory framework of the Member States. Other exceptions are what some have called a 'shopping list' in which Member States can choose. So much for the harmonization purpose marketed by the Commission. See: Hugenholtz (2000a): 499-502.

was only optional. Therefore, if one exception of article 6(4) has not been chosen by a country to be part of its copyright regime, it does not make sense to grant the exception to users in the case of a technological restraint. For instance, France does not know any education or research-related exceptions. This should not change when implementing the directive. The French legislature will not be obliged to make available to educational institutions the means to benefit in the practice from an exception that does not exist in the law. This underlines the strangeness of the whole article 6(4) that makes mandatory the safeguarding of exceptions whose enactment itself is not.

But the provision of article 6(4) has to benefit also to similar exceptions that could exist in the related rights and *sui generis* right regimes.

The second indent of the article 6(4) provides for a similar solution (appropriate measures of the States if rightholders fail to do so) as far as private copy is concerned. In that case, the intervention of the legislator is not mandatory, but optional. Here also, the initiative lies on the rightholders who can namely put in place serial copy management systems allowing for one or a small number of copies. The directive requests from Member States not to prevent rightholders from adopting such measures. The directive states further that all technological measures either applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, or applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1. Such a precision is not useless. Otherwise, some defendants having circumvented the serial copy management systems, could argue that, since the technological measure aims at guaranteeing a private copy exception, it does not comply with the definition of the measure, as laid down in article 6(3), that qualify the measure as aiming at restricting an unauthorized act. It would be of course a somewhat distorted defense.

The fourth indent of 6(4) might be the greatest defect of the whole construction. It says that the provisions of the first and second subparagraphs [i.e. the obligation to take some measures to safeguard some exceptions] shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

The wording of this provision plainly refers to the definition of the right to make works available to the public, as laid down in article 3 of the directive. It would mean that any on-demand service will not have to comply with the obligation to safeguard the exceptions and could be completely locked up. One case put forward by the music industry is the making available of music for a limited time, e.g. for the duration of one weekend where you plan to have a party. According to the IFPI, enabling some exceptions, such as the private copy, would ruin this new business model of distribution, and thus the normal exploitation of the work.

The vagueness of the wording could nevertheless jeopardize all the good intents of article 6(4). Making available works on the Internet could become the prevalent business model for distribution of works. The requirement that such services have

to be delivered on contractual terms does not matter much given the easiness to embed a click-wrap license in digital products. Some commentators have expressed concerns about this paragraph that could comprise the whole Internet and make void any obligation for preserving some exceptions. I share those views.

Another provision of the directive tends to promote the balance between the exceptions and the risk of a technical lock-up. The article 12 asks the European Commission to examine the implementation and effects of some provisions of the directive. As far as article 6 is concerned, the Commission will have to consider whether acts which are permitted by law are being adversely affected by the use of effective technological measures. The wording here reminds of that of the US DMCA that entrust the Library of Congress with a similar rulemaking. In the European context, the rulemaking will be less direct, since the Commission, as a result of such a consideration, can only propose some amendments to the directive to be finally decided by the European Council and Parliament.

V Miscellaneous

V.1 Exemptions of Liability for Circumvention Activities

Contrary to the DMCA, the European directive does not provide for a list of exceptions to the prohibition of circumvention or to the ban of circumventing devices. Nevertheless, some recitals of the directive state that the protection should not hinder research into cryptography¹¹⁸⁶. It should neither inhibit nor prevent the development or use of any means of circumventing a technological measure that is necessary to enable reverse engineering or the testing of the good functioning of computer programs¹¹⁸⁷, as authorized by the articles 5(3) and 6 of the Directive 91/250/EEC. Circumventing a technological measure, or developing means to do so, will be allowed when the purpose is to reverse engineer the technically-protected program¹¹⁸⁸.

The legal force of such exceptions as included in the recitals, is not plain. Even though recitals can only serve as interpreting tools of the directive itself, one could argue that if a Member State has not implemented an exception for reverse engineering, it has not properly transposed the directive since the legal protection it has enacted is not proportional.

V.2 No Mandate

Some technical protection mechanisms require the compliance of the players or reproduction devices. A signal or, as it is sometimes called, a "flag" is then

¹¹⁸⁶ See: Recital 48 in fine.

¹¹⁸⁷ See: Recital 50.

¹¹⁸⁸ The reverse engineering will have to comply with the conditions laid down in the software directive of 1991, i.e., it should be carried out by a legitimate user and the informations necessary to achieve the interoperability are not in any other way available. The purpose of the reverse engineering, and this of the circumvention needed in that purpose, should be to achieve the interoperability.

embedded in the digital code of the work and sent to the player device for recognition. When the device acknowledge such signal, it can inhibit the copy, printing, or access to works. The electronic consumer manufacturing industry did not want to be obliged to devise their products in such a way that they comply with any technical protection scheme on the market. Therefore, it asked, as in the DMCA, a no mandate clause clearly stating that no such obligation lies upon it. The no mandate clause appears in the recital 48 that confirms that there is "no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6".

The same recital reassures the electronic consumer manufacturing industry about the necessity to preserve the playability of the works on their devices. The technological systems put in place by copyright holders should not prevent the normal operation of electronic equipment and its technological development.

V.3 Acquis Communautaire and the Software Directive

The software directive of 19 May 1991¹¹⁸⁹ is the first piece of enabling legislation which has ever provided a legal protection of anti-copy devices in Europe. The article 7 1 (c) of the software directive stated that "[...] *Member States shall provide [...] appropriate remedies against a person committing [...] c) any act of putting into circulation or the possession for commercial purpose of, any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program.*" The protection contained herein is mostly similar in Member States legislation having transposed the Directive.

The information society directive contains a rather odd provision. Indeed its recital 50 provides that "[the] *legal protection* [of technological measures] *does not affect the specific provisions on protection provided for by Directive 91/250/EEC. In particular, it should not apply to the protection of technological measures used in connection with computer programs, which is exclusively addressed in that Directive*".

As a consequence, circumvention activities should only be prosecuted on the grounds of the national provisions having transposed the article 7(c) of the software directive. This article did only cover the trafficking in devices and not the circumvention itself. Furthermore, only the devices whose sole intended purpose was the circumvention, and only the commercial activities related to such devices are unlawful under the 1991 directive. The protection for technological measures applied to software is thus less than for other types of works. It would have been logical to delete the article 7(c) of the software directive and to provide the same level of protection for whatever type of works are concerned. This twofold regime could lead to surprising consequences. For instance a technological tool could be apply to protect both software and audiovisual works. Its circumvention would

be unlawful when applied to audiovisual works, but would not be when applied to software.

An encryption key could be used to encrypt both computer programs and films. One person would post the decryption key on the Internet, without pursuing any commercial purpose. She could be sued under the transposition of the 2001 directive, that does cover commercial and non commercial activities of trafficking in circumvention devices, but not under the earlier directive as far as computer programs are concerned. In practice that would exclude the copyright holders in the software using this particular encryption from the possibility to bring an action against her.

It has been said that no modification of the *acquis communautaire* was required since the main features of article 6 of the directive on the copyright in the information society were already reflected in the software directive¹¹⁹⁰. The software industry has also alleged that the regime of the former directive was functioning well in practice. If so, we could wonder why the extended protection envisaged in the new directive, including the act of circumvention and any non commercial trafficking in circumventing devices, would be better adapted than a more restricted regime that proved to be adequate. It is worthwhile to note that if the protection against circumvention of software is not regulated under the article 6 of the 2001 directive, it implies that the software industry is not obliged to take measures to accommodate some exceptions. This likely satisfies the software industry.

VI Conclusion

The legal protection against circumvention granted by the European directive of the 22d of May, 2001, is likely the most extensive protection in all implementations of the WIPO Treaties of 1996. It covers a whole range of technological measures, from anti-copy devices, monitoring and tracking systems, digital rights management to access controls; it protects the technical conveyance of the exclusive rights, as well as of any use of the work that would not be authorized by the copyright or related right holders, even beyond the scope of the copyright monopoly; it prohibits both the circumvention and the trafficking in devices that could enable or facilitate it. Neither the United States, nor Australia, nor Japan, have been that far.

As far as the issue of the copyright exceptions is concerned, the European legislator has been rather audacious. Instead of exempting circumvention activities where carried out in the purpose of a legitimate use, it tries to impose the exercise of some exceptions to the operation of technological measures. This implies that the exceptions are given a positive meaning and not only a defensive nature. It is certainly the first time that authors are asked to facilitate the exercise of exceptions to their rights.

¹¹⁸⁹ See: Directive 91/250/CEE, JO L 122/42, 17.05.91.

¹¹⁹⁰ See: Reinbothe (2001): 80/5.

Having said that, the boldness of the directive is constrained by a number of features. Only some exceptions are concerned and the initiative mainly lies upon the rightholders. The exception to the copyright becomes a matter for negotiation and contracting, in favor of the authors. The legislative power has yet to intervene but only subsidiarily to the measures taken by the authors.

More essentially, the general exemption granted in favor of on demand services, hence in favor of most of the business models that will govern the distribution of works on the Internet, will likely to jeopardize the fragile balance the article 6(4) seeks to achieve. At the end of the day, it surely appears that this balance is strongly tipped in favor of the copyright and related right holders who, despite their strong opposition to this odd provision, might not be so disadvantaged thereby than they pretend to be.